

BRB No. 92-1369

ELSIE MARIE STEWART)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

John F. Dillon and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-2112) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim under the Act seeking benefits for a noise-induced hearing loss. Prior to the scheduled hearing in this case, the parties entered into an agreement whereby employer was to provide claimant with a lump sum payment of \$2,586.80 plus \$375.61 in interest to compensate him for his occupational hearing loss. Accordingly, claimant's counsel requested that the case be remanded to the district director for further appropriate disposition pursuant to 20 C.F.R. §702.315 and on July 19, 1991, the administrative law judge issued an Order of Remand.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge, requesting \$2,576.50 for 20.50 hours of services at \$125 per hour and \$14 in expenses. Employer filed objections to the fee and claimant replied, seeking an additional one-hour fee for time spent in defending the fee petition. The administrative law judge reduced the hourly rate sought to \$110, and disallowed both the requested expenses and the one-hour sought in claimant's reply brief for responding to employer's objections. Accordingly, he awarded claimant's counsel a fee of \$2,255, representing 20.5 hours of services at \$110 per hour.

On appeal, employer challenges the administrative law judge's fee award on various grounds, incorporating by reference the objections it made below into its appellate brief. Incorporating her reply brief below, claimant responds, urging affirmance of the fee award.¹

Employer initially contends that the fee awarded is excessive, arguing that consideration of the quality of the representation provided, the complexity of the issues involved, and the amount of benefits obtained mandates a complete reversal or at least a substantial reduction of the fee awarded. We need not address these arguments, however, as they are being raised by employer for the first time on appeal. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd in pertinent part mem. sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995); *Hoda v. Ingalls Shipbuilding, Inc.*, 28 BRBS 197 (1994) (McGranery, J., dissenting) (Decision on Recon.); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993). We note, however, that the administrative law judge explicitly considered the complexity of the case in reducing counsel's requested hourly rate from \$125 to \$110. Supplemental Decision and Order at 2; *see generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989).

¹Although claimant filed a cross-appeal in this case on April 14, 1992, this appeal was subsequently dismissed by the Board at claimant's request on May 12, 1993. In her reply brief below, which claimant has incorporated by reference into her response brief, claimant asserts that she is entitled to a one-hour fee for time spent in defending the fee petition. We need not address claimant's assertion in this regard, however, because it challenges the administrative law judge's findings; such arguments may not properly be raised in a response brief but rather must be raised in a cross-appeal. *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988).

Employer further contends that the hourly rate of \$110 awarded to claimant's counsel does not conform to reasonable and customary charges in the area and that an hourly rate of \$75 to \$80 would be more appropriate. We disagree. Employer's unsupported assertions are insufficient to meet its burden of establishing that the hourly rate awarded was unreasonable.² See *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); see generally *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Employer additionally objects to counsel's use of the minimum quarter-hour billing method. Although the administrative law judge found this method of billing to be permissible as well as acceptable, our review of counsel's fee petition indicates that it generally conforms to the guidelines set forth in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, 46 F.3d 66 (5th Cir. 1995)(unpublished) and *Ingalls Shipbuilding, Inc. v. Director OWCP [Fairley]*, No. 89-4459 (5th Cir. July 25, 1990)(unpublished). In *Biggs*, the Fifth Circuit recently held that the unpublished fee order in *Fairley*, which held that attorneys, generally, may not charge more than one-eighth hour for reading a one-page letter and one-quarter hour for writing a one-page letter is binding case precedent which must be followed. The one-quarter hour entries claimed on May 22, 1991, for receipt and review of Notice of Appearance, and on June 6, 1991, for receipt and review of a one-page letter from carrier regarding remand, however, are excessive under the aforementioned criteria. Accordingly, we modify the administrative law judge's fee award to reflect the reduction of these two entries from one-quarter to one-eighth of an hour each.³

²We note that employer attached a copy of an article from a Mississippi Defense Lawyers Association newsletter to its objections raised below; this article, however, does not support employer's contention that the fee awarded in the instant case was unreasonable.

³The administrative law judge allowed one-quarter hour for preparing letters, and the Fifth Circuit has stated that this is a reasonable amount of time for a one-page letter. See *Fairley*, slip op. at 2. Because the other one-quarter hour entries claimed by counsel involved either the review of multi-page or non-routine correspondence, or the performance of more than one service, the administrative law judge's allowance of these entries is also consistent with *Fairley* and *Biggs*.

Employer additionally challenges the number of hours requested by claimant's counsel and approved by the administrative law judge.⁴ In considering counsel's fee petition, the administrative law judge addressed employer's specific objections but declined to reduce the number of hours requested, finding all of the time claimed therein to be reasonable and necessary. Employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in this regard. Accordingly, with the exception of the reduction in the two quarter-hour entries previously discussed, we decline to reduce or disallow the hours approved by the administrative law judge. *See Maddon*, 23 BRBS at 62; *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981).

Accordingly, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is modified to reflect the reduction of two entries from one-quarter hour to one-eighth of an hour. Counsel is therefore entitled to a fee of \$2,227.50 representing 20.25 hours of services at \$110 per hour. In all other respects, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁴We reject employer's argument that the administrative law judge must base his fee award in this case upon the decision rendered by another administrative law judge in *Cox v. Ingalls Shipbuilding, Inc.*, 88-LHC-3335 (Sept. 5, 1991), for the reasons stated in *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 156, *modifying in part on recon.* 28 BRBS 27 (1994). 33 U.S.C. §928(c).